



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: D/FW Appraisal Corporation

File: B-248429.2

Date: September 30, 1992

Leslie A. Fox, Esq. for the protester,
Robert S. Brock, Esq., Federal Emergency Management Agency,
for the agency.
Jeanne W. Isrin, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest of technical evaluation of proposal is untimely where filed more than 10 working days after debriefing at which protester learned the basis for determination that its proposal was technically unacceptable.
2. Technically unacceptable offeror is not interested party eligible to protest award to another offeror where protest of technical evaluation of its proposal was untimely filed, and where there is an intermediate offeror which would be in line for award if the protest were sustained.
3. Fact that firms awarded contracts are former contractors or employ former agency employees does not establish that the awards were based on improper bias, and absent evidence that evaluations were influenced by this fact, alleged bias amounts to no more than unsupported speculation.

DECISION

D/FW Appraisal Corporation protests the rejection of its proposal as technically unacceptable and the award of a contract to Quality Inspections (QI), under request for proposals (RFP) No. EMW-91-R-3797, issued by the Federal Emergency Management Agency (FEMA) for habitability inspections in relation to federal disasters and emergencies.

We dismiss the protest.

On May 1, 1991, the requirement was synopsized in the Commerce Business Daily. Eighty-six firms responded and were sent copies of the solicitation, which was issued on October 10. Thirteen proposals, including the protester's,

were submitted by the November 22 closing date. Based on an initial evaluation, six firms were included in the competitive range. D/FW was advised by letter of December 30 that its proposal was determined unacceptable and outside of the competitive range due to technical deficiencies. FEMA ultimately awarded five contracts, including one to the fourth-ranked offeror, QI. All offerors were notified of the awards by letter of April 10.

D/FW was provided a debriefing on January 22. On April 22, D/FW protested the rejection of its proposal as technically unacceptable and the award to QI. D/FW challenges FEMA's determination that its proposal was technically unacceptable, arguing, for instance, that although its earthquake plan was located with its business proposal, FEMA was not justified in failing to consider it. As to the other deficiencies, it claims that its proposal established that it was well qualified and could meet the contract requirements.

Our Bid Protest Regulations require that protests be filed not later than 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1992). More specifically, a protest based upon information provided to the protester at a debriefing is untimely if filed more than 10 working days after the debriefing. TeleLink Research, Inc., B-247052, Apr. 28, 1992, 92-1 CPD ¶ 400.

As indicated, D/FW was provided a debriefing on January 22. D/FW asserts that this debriefing was incomplete because the notes of some members of the evaluation panel were not available at that time, and that it therefore was justified in delaying its protest until 10 days after receiving notice of the awards. We disagree. Although the agency's memorandum documenting the debriefing indicates that more information was to be later sent to D/FW, it is clear that the debriefing put D/FW on notice of the specific bases of its protest: its proposal was technically unacceptable for lack of an earthquake plan (because it had been improperly included in D/FW's business proposal rather than the technical proposal as required), and for overall weaknesses in its quality control plan, its technical management plan, and in demonstrated supervisory experience. While receipt of additional information at a later date might have provided D/FW with an opportunity to more fully elaborate on its disagreement with FEMA's evaluation of its proposal and handling of the procurement, such was not required in order to file this protest. See TeleLink Research, Inc., supra. Our Regulations provide ample opportunity for a protester to respond to the agency's position; however, as an initial matter it was important for the protester to timely file a protest once it knew the bases for its protest issues. Id.

Because D/FW did not file its protest until April 22, 3 months after the debriefing, this aspect of the protest is untimely and will not be considered.^{1 2}

D/FW also argues that the evaluation was biased in favor of QI. Under our Regulations, a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. §§ 21.0(a) and 21.1(a); Bridge Street Acquisition Corp., B-239121.3, Nov. 13, 1990, 90-2 CPD ¶ 388. A protester is not an interested party eligible to challenge the propriety of award to another offeror where the protester's proposal was eliminated from the competitive range, the protester did not timely challenge that elimination, and there is another offeror's proposal, besides the awardee's, remaining in the competitive range that would be next in line for award if the protest were sustained. See Vinyl Technology, Inc., B-233220, Oct. 25, 1988, 88-2 CPD ¶ 394. As these are precisely the circumstances here, we conclude that D/FW is not an interested party for purposes of challenging the award to QI.³

¹This is true despite D/FW's complaint that it was misled by contracting officials at the debriefing to believe that any protest prior to award would be untimely. Notwithstanding inaccurate information that may have been received from the agency, prospective contractors are charged with constructive notice of our Regulations since they are published in the Federal Register and appear in the Code of Federal Regulations. See Acker Elec. Co., B-244413, July 12, 1991, 91-2 CPD ¶ 52.

²D/FW argues that we should consider its protest under the significant issue exception to our timeliness rules. However, that exception is strictly construed and sparingly used to prevent the timeliness rules from becoming meaningless. We invoke it only if it raises an issue of first impression and of widespread interest to the procurement community. Mirada Assocs.--Recon., B-246376.2, Jan. 2, 1992, 92-1 CPD ¶ 12. Such is not the case here.

³In its comments on the agency report, D/FW challenged, essentially, the responsibility of the intervening party, claiming that it was formed for the purpose of competing on the procurement, was likely not a corporate entity at the time of the evaluation, and therefore could not have provided a 3-year financial history, as the solicitation required. However, the solicitation, Section M.3, page 102, specifically addressed the possibility that the proposing entity might be newly-formed and not necessarily of a corporate form, in which case the experience of the entity's
(continued...)

D/FW claims more generally that the entire procurement was biased in favor of former contractors and former FEMA employees, and tainted by conflicts of interest.⁴ The determination that such improprieties are likely to have occurred must be based on facts and not mere innuendo or suspicion. NES Gov't Servs., Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291; Laser Power Technologies, Inc., B-233369 et al., Mar. 13, 1989, 89-1 CPD ¶ 267. The fact that former contractors or former FEMA employees received awards does not mean the evaluation was biased. A firm may gain an advantage over other firms by virtue of prior experience, and such an advantage, so long as it is not the result of preferential treatment or other unfair action by the government, need not be discounted or equalized. Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. We have examined the evaluation of proposals and find no evidence that the awards were based on other than the information in the proposals and the evaluation criteria in the RFP.

The protest is dismissed.


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³(...continued)

composing elements could be offered instead. Therefore, even if D/FW's claims were true, they would not render the intervening party ineligible for award.

⁴In its comments on the agency report, D/FW claimed for the first time that the solicitation was biased in favor of former contractors and former FEMA employees, and that the solicitation was misleading as to what would be considered adequate and appropriate technical and business experience for performance. Under our Regulations, these constitute alleged solicitation deficiencies, and therefore had to be raised prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Because D/FW did not do so, they are untimely. To the extent that D/FW might argue that it only became aware of them after the awards were announced, they clearly could have been raised in the initial protest submission, and therefore are untimely in any case. See Sierra Technology and Resources, Inc., B-243777.3, May 19, 1992, 92-1 CPD ¶ 450.